



applied, the employees' reasonable expectation of re-employment appears the probable test. So long as such a reasonable expectation existed the strike would continue.

Rules which may be abstracted from the strike cases do not constitute as sound a basis for prediction as their logical pattern might indicate. Some of the criteria, particularly in the termination cases, are descriptive of the case in issue and couched in language which gives them the color of essential requirements. But careful examination yields the idea that in many instances the elements of the strike described are not essential to the holding, but are simply permitted by the peculiar facts of the case.⁵⁴ With litigation in the strike area increasing in volume and importance, existing cases are useful for the broad outlines they have sketched. The fine lines of the strike concept are being drawn by carefully reasoned opinions in current cases.⁵⁵

R. M. A.

LEGISLATION

THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT OF 1940.

On October 17, 1940, the Federal Soldiers' and Sailors' Civil Relief Act of 1940¹ became effective. This act applies to all persons on active duty on that date and to all who enter the service before May 15, 1945, unless the United States is then engaged in a war, in which event the act shall remain effective until six months after a peace treaty has been proclaimed by the President.² Much of the act is the same as the Soldiers' and Sailors' Civil Relief Act of 1918. What effect does the new act have? What is its purpose? How does it work? What must the man in the service do in order to enjoy its benefits? It is the purpose of this comment to state in as concise a manner as the subject permits the effect of this law.

Purpose

The act in no way cancels or annuls any debts or obligations; its primary purposes are (a) to provide for a suspension of due dates on obligations until the man in the service has had a sufficient time to

⁵³ *Park Hotel v. Union*, *supra*, n. 32; *Hamilton Tailoring Co. v. Clothing Workers*, *supra*, n. 31.

⁵⁴ *Supra*, notes 47 and 48.

⁵⁵ *United States Coal Co. v. Board of Review*, *supra*, n. 13.

¹ U.S.C.A., Title 50, App. secs. 501-585 incl. For a discussion of the Act's constitutionality, see A.B.A.J. for Jan. 1, 1941, at p. 23, and 2 WASH. & L. L. REV. 1 at 34.

² Secs. 101(1)(2), 604.

reestablish himself financially; (b) to give the soldier or sailor adequate protection in suits prosecuted or which might otherwise be prosecuted against him during the period of his enlistment; and (c) to give those men having homestead claims, mining claims, mineral leases, desert rights, and grazing rights on United States land certain legal rights in order that their position shall not be prejudiced by acceptance of their military duties. It is further provided that when stays, postponements, and suspensions of obligations and liabilities, and the vacating or setting aside of a judgment or decree are granted as provided for by the act, similar benefits may, in the discretion of the court, be extended to sureties, guarantors, endorsers, and others subject to the obligation or liability.³

Litigation

The act, which applies to all proceedings in both federal and state courts,⁴ gives the man in the service protection against litigants who would otherwise have an unfair advantage over him. In order that his adversaries in law suits should not seize upon his absence to prejudice his rights, the law has provided for the filing of affidavits by plaintiffs as to defendants' whereabouts, the posting of bonds of indemnity by plaintiffs whose causes are allowed to proceed to judgment, the appointment of attorneys to defend absentee defendants, and the vesting of power in the courts to grant stays of all actions and proceedings to which he is a party. If the courts interpret the law and exercise their discretion in accord with the spirit of the act, men who are involved in litigation during their absence should not be in a disadvantageous position as a result of their military service.

There are two parts in which the provisions of the act relating to litigation may be divided, that applying to default judgments and that applying to all suits in which one of the parties is in the military service. In regard to the former, the counsel for a plaintiff suing a defendant in any court in which there is an expectation of taking a default judgment should come into court with an affidavit of the plaintiff stating that the defendant is or is not in the military service or that the plaintiff is unable to determine such fact. The law provides that such affidavit must be filed before any default judgment is entered.⁵ However, under a similar provision in the 1918 Act, it was held that if the defendant was not in the service at the time the affidavit should have been filed, the plaintiff's

³ Sec. 103 (1), (2).

⁴ Sec. 102(1).

⁵ Sec. 200(1).

failure to file it did not affect the judgment's validity.⁶ The act further provides that if there is a failure to file an affidavit showing that the defendant is not in the service a judgment may not be entered without first securing an order of court directing such entry.⁷ This latter seems to contemplate a general procedure in which the clerk is permitted to enter a default judgment without having the entry signed by a judge. Under the act no such judgments may be entered without first securing the previously mentioned order of court. Such order may not be made by the court until an attorney has been appointed by the court to represent and protect the absentee defendant's interests.⁸ Attorneys so appointed receive no compensation, but it is taken for granted that all members of the bar will consider it a duty to serve. An appointed attorney has no power to waive any right of the person for whom he is appointed nor to bind him by his acts.⁹ In the cases where the court makes such an order it may require the plaintiff to file a bond to indemnify the defendant if it later appears that he was in the military service and was prejudiced by the entering of the default judgment.¹⁰ According to these provisions it appears that there still exists the possibility of such judgments being entered against defendants, with a discretionary power resting in the court as to requiring the plaintiff to post a bond of indemnity, in those jurisdictions in which the general procedure is for the clerk to enter default judgments. On the other hand, in those jurisdictions in which the court makes its own journal entries without any requirement of an order to that effect, no default judgments may be taken. Possibly the courts in the latter jurisdictions will disregard the provision as to an "order directing such entry" and interpret the statute to read as if it had been written to the effect that no default judgments may be entered without such affidavits "except on leave of court." If this should be done, these courts probably would consider the provisions regarding appointment of attorneys and posting of bonds of indemnity applicable to entry of default judgments as well. If there should be a failure on the part of counsel to use these affidavits as provided for by the law and of the courts to apply the provisions of the act relative to bonds, absentee defendants may lose valuable rights. The last subsection dealing with this matter gives the defendant who

⁶ *Eureka Homestead Soc. v. Clark*, 145 La. 917, 83 So. 190 (1919); *Wells v. McArthur*, 77 Okla. 279, 188 Pac. 322 (1920); *Bulgin v. Am. Law Book Co.*, 77 Okla. 112, 186 Pac. 941 (1920); *Howie Mining Co. v. McGary*, 256 Fed. 38 (1919); *Alzugaray v. Onsurez*, 25 N.M. 662, 187 Pac. 549 (1920); *Harrell v. Shealey*, 24 Ga. App. 389, 100 S.E. 800 (1919).

⁷ Sec. 200(1).

⁸ *Ibid.*

⁹ Sec. 200(3).

¹⁰ Sec. 200(1).

was in the military service and was thereby prejudiced from making his defense a right to have the court that rendered the judgment open the same. His application for reopening must be made within ninety days after the termination of his service and in it he must show that he has a meritorious or legal defense to the action.¹¹ However, even if the defendant succeeds in having the judgment set aside, he may gain no advantage. There is the possibility that the plaintiff had not been required to post a bond of indemnity at the time judgment was entered on the order of court and that the plaintiff will at this late date, be judgment-proof. If so, the reopening of the case has not helped defendant's position. Furthermore, the act itself provides that the vacating, setting aside, or reversing any judgment under the provisions of the act shall not impair any right or title acquired by a bona fide purchaser for value under such judgment.¹²

The second part provides that all actions or proceedings in which one of the parties is in the military service shall be stayed for the period of military service and three months thereafter or any part of such period, unless it is the opinion of the court that the party is not materially affected by reason of his military service.¹³ Under a subsequent section, in actions against men in the military service, the court may, for a similar period, stay the execution of a judgment or order and vacate or stay any attachment or garnishment of property, money, or debts in the hands of another, whether before or after judgment.¹⁴ This power also is not to be exercised, if in the opinion of the court, the ability of the defendant to comply with the order or judgment is not materially affected by reason of his military service. In these cases the court may act on its own motion, and it must act on application to it by the party in the military service or someone in his behalf.¹⁵ The courts have the further power to provide against the accrual and enforcement of fines or penalties on contracts in which there has been a failure to comply with the terms due to the stay granted pursuant to the act.¹⁶ The courts, in granting stays, are not required to order stays for arbitrary periods of time, but may in their discretion provide for any such terms as may be just, even to the extent of ordering installment payments. Where the person in military service is a codefendant with others, the plaintiff may, after obtaining leave of court, proceed against the others.¹⁷

¹¹ Sec. 200(4).

¹² *Ibid.*

¹³ Sec. 201.

¹⁴ Secs. 203, 204.

¹⁵ Sec. 203.

¹⁶ Sec. 202.

¹⁷ Sec. 204.

The period of military service is not to be included in computing the period of time under state and federal statutes of limitation for bringing of any action by or against any person in military service.¹⁸

Rent

The provisions applicable to rent are practically the same as those in the Soldiers' and Sailors' Civil Relief Act of 1918, except that the new law extends protection against evictions to rentals of eighty dollars, instead of fifty dollars a month. Eviction and distress of the wife, children or other dependents of a person during the period of his military service are declared unlawful and punishment is provided therefor, unless they are upon leave of court. This section is not applicable if the agreed rent is in excess of eighty dollars per month.¹⁹ The court shall, on application of the defendant or his representative, stay such court proceedings for not longer than three months, or it may make such other orders as it deems just, unless in the opinion of the court the ability of the tenant to pay the agreed rent is not materially affected by reason of defendant's military service.²⁰ The respective secretaries of War, the Navy, and the Treasury (for the Coast Guard) are empowered to order an allotment of the pay of a person in military service in reasonable proportion to discharge the rent of premises occupied by his wife, children or other dependents.²¹

Installment Purchases, Conditional Sales, Mortgages, Etc.

The courts are given broad discretionary powers to protect men in the service against forfeiture of deposits and installments on contracts of sale and against foreclosure of their rights on mortgages or instruments of similar form.

Unless a court order has been obtained, installments and deposits received prior to October 17, 1940 on contracts of purchase, lease or bailment are not to be forfeited, nor may any rights be foreclosed, if the adverse party is in the military service.²² The court is given several alternatives in disposing of such cases. It may order repayment of the money already paid as a condition of terminating the contract and resuming possession of the property, it may order a stay of the proceedings for a period not longer than three months after the termination of the party's military service, or it may make such other equitable disposi-

¹⁸ Sec. 205.

¹⁹ Sec. 300(1).

²⁰ Sec. 300(2).

²¹ Sec. 300(4).

²² Sec. 301(1).

tion of the case as is necessary to conserve the interests of the parties. If the court thinks that the defendant's position is not materially affected by reason of such service, the suit may proceed as usual.²³ Similar stays are permitted in connection with mortgages and trust deeds given prior to October 17, 1940.²⁴ All sales resulting from powers of sale or confessed judgments, on secured obligations during the defendant's military service or within three months thereafter, are declared invalid unless an order of sale and return thereto made and approved by the court has been previously granted.²⁵ A new section was added in the 1940 Act relating to proceedings to resume possession of a motor vehicle, tractor, or the accessories of either, and providing for an exception to the proceedings which may be stayed by an order of court. This section prohibits the granting of any such stays where the court finds that less than fifty per cent of the purchase price of the property has been paid. However, in any such proceedings, the court may, before entering an order or judgment, require the plaintiff to file a bond, conditioned to indemnify the defendant who is in the service.²⁶ The parties to the contract are not prevented from modifying, terminating, or cancelling the contract and are not prevented from agreeing to the repossession or retention of the property, if such agreement is executed in writing subsequent to the making of the contract and during or after the period of military service of one of the parties.²⁷

Life Insurance

By making proper application to the designated official, the enlisted man can prevent his life insurance policies from lapsing for non-payment of premiums, during the period of service and for one year thereafter. Protection of the statute is only extended to holders of certain policies and within the limitations stated in the act. The insurers who fail to receive their premiums as a result of this law may obtain from the government certificates of guaranty, in return for which the government takes a lien on the policy.²⁸

The act provides that life insurance policies up to \$5000 in companies required to have a reserve by statute, or which charge all policy holders a premium to cover the special war risk of those insured persons

²³ Sec. 301(3).

²⁴ Sec. 302(1), (2).

²⁵ Sec. 302(3).

²⁶ Sec. 303.

²⁷ Sec. 301(1). Of further interest to those owning real estate in which a mortgage has been executed under the Federal Housing Authority is the recent regulation of the F.H.A. that each mortgagor that has availed himself of an F.H.A. mortgage may have a thirteen month moratorium in the event that the mortgagor is called into military service.

²⁸ Secs. 407, 408.

who are in military service, may be protected from lapse for the non-payment of premiums for the period of service and one year thereafter.²⁹ Such contracts must be executed and a premium paid thereon before October 17, 1940, or not less than thirty days before entry into the service. Protection is not extended to any policy on which premiums are due and unpaid for a period of more than one year when an application for the benefits of the act is made, to any policy on which there is an outstanding loan or other indebtedness equal to or greater than fifty per cent of the policy's cash surrender value,³⁰ nor to any policy which is void or voidable if the insured is in the military service.³¹ The insured consents when applying for the benefits of this act that before any dividend is paid or any loan or settlement is made on his policy, the insurance company must first obtain the written consent of the Veterans' Administration.³² Such consent probably will not be forthcoming unless the government can be adequately protected on its certificate of guaranty to the insurance company after the contemplated payment or loan is made. The insured must, within one year after termination of military service, pay to the insurer all past due premiums with interest at the rate provided in the policy for loans, or the policy immediately becomes void, and the insurer must pay the insured the cash value, deducting therefrom the amount of the government's lien for the premium payments it has guaranteed the insurer.³³ In order for an enlisted man to apply for benefits under the act he must make application to the Administrator of Veterans' Affairs.³⁴

Taxes

Any person in the service may file an affidavit with the tax collector and gain a moratorium on payment of his real property taxes for a period ending no later than six months after termination of his military service. Payment of income taxes may also be postponed for a similar period. In order to take advantage of the section pertaining to real property taxes the aforementioned affidavit must be filed, stating therein the assessment of the tax, that such is unpaid, and that by reason of the affiant's military service, his ability to pay has been materially affected. No sale of the property shall thereafter be made to enforce collection, nor any other proceeding commenced in respect to the same matter, except upon leave of court.³⁵ The tax must be one falling due during

²⁹ Secs. 402, 405, 414.

³⁰ Sec. 402.

³¹ Sec. 413.

³² Secs. 401(1), 408.

³³ Secs. 409, 410.

³⁴ Sec. 401.

³⁵ Sec. 500(2).

the period of military service in respect to real property owned and occupied for dwelling, agricultural, or business purposes by a person or his dependents at the commencement of his period of military service, and still so occupied by his dependents or employees.³⁶ The proceedings or sale may be stayed by the court for a period extending not more than six months after the termination of military service, during which time the unpaid taxes bear interest at six per cent until paid, but no other penalty or interest may be incurred by reason of their non-payment.³⁷ When by law such property is sold or forfeited to enforce the collection of the tax, the owner has the right to redeem or commence an action to redeem the property any time not later than six months after termination of his period of service, unless the local law gives a longer period in which to redeem.³⁸

Collection of income tax falling due prior to or during the time of military service is deferred for a period extending not more than six months after discharge if ability to pay such tax is materially impaired by reason of such service. No interest or penalty accrues during this period of deferment. The running of any statute of limitation against the collection of such tax is suspended for the period of military service and for an additional period of nine months.³⁹

Homestead and Mining Entries

There are specific provisions in the act against forfeiture of rights acquired prior to entering the service by holders of homestead entries, lessees of mining and mineral lands of the United States, permittees or licensees of grazing lands, and holders of desert-land entries.⁴⁰ The effect is to make the period of military service equivalent to the time of occupation or the requisite improvement. In all such cases the act provides for the notification of the proper federal authority by the person in the service of his desire to take advantage of the benefits provided for under the act.

Administrative Remedies

It is provided in the act that in any civil proceeding to enforce a right where it is made to appear that any interest, property or contract has been transferred since October 17, 1940, with intent to delay the just enforcement of such right by taking advantage of the act, the court

³⁶ Sec. 500(1).

³⁷ Sec. 500 (2), (4).

³⁸ Sec. 500(3).

³⁹ Sec. 513.

⁴⁰ Secs. 501-512 incl.

shall enter such judgment or make such order as might lawfully be made in the absence of such act.⁴¹

In proceedings under the act in which it is necessary to prove that a person is or is not in the military service a certificate signed by the Adjutant General of the Army, the Chief of the Bureau of Navigation of the Navy Department, or the Major General Commandant of the Marine Corps is *prima facie* evidence.⁴²

Shortcomings of the Act

In the haste of enactment of this act by Congress, certain matters apparently have not been thoroughly considered. It is doubtful if the act accomplishes all that was intended. "To suspend enforcement of civil liabilities, in certain cases, of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the Nation" are the words found in the first section of the law. The act fails to make any provision for dependents forced to maintain themselves on an income of approximately thirty dollars a month,⁴³ which most of the men in the ranks will receive. (This assumes that the person in the service sends his entire earnings home.) It is true that the officers will receive a sufficient amount to provide for their dependents, in some instances probably more than their ordinary income, but it is not these who will constitute the serious economic problem. The problem concerns the men in the ranks. There is also a failure to do anything about the plight of the professional or small-business man whose success depends upon his personal attention. The fairness of the provisions making it necessary that the trainee pay off his over-due obligations within three months is questionable.⁴⁴ This period might well be two years, or there might be a provision that the courts could provide for installment payments as a matter of discretion after the termination of the enlistment. In view of the practical difficulties involved in getting back to work, it appears very unlikely that the ordinary laborer, and particularly the drafted one, will be able in three months to provide for himself and family a financial readjustment after being away a whole year. Another shortcoming of the act is that its provisions apply only to installment contracts on which deposits or installments have been paid on or before October 17, 1940. Is it to be expected that all those subject to call will cease buying on the installment plan on October 17, 1940? The provisions with regard to mortgage

⁴¹ Sec. 600.

⁴² Sec. 601.

⁴³ For the first four months of training most men in the ranks will receive only \$21 per month.

⁴⁴ This is the usual period; there are some exceptions.

foreclosures are similarly inadequate, since the benefits of the act extend only to those contracts in existence prior to October 17, 1940. Furthermore, the act fails to mention foreclosure by entry and possession and statutory foreclosure by advertisement and sale.⁴⁵ Not much is offered in the way of protection for life insurance policy holders, since the act doesn't apply if fifty per cent or more of the loan value of the policy has already been borrowed. If there is fifty per cent of the loan value left, it would generally be sufficient to carry the policy for the year regardless of this law. The act would be beneficial to holders of new policies because their policies' loan values would be low, but to practically all others nothing advantageous is gained under the act. Moreover, the act applies to a maximum of \$5,000 insurance. The section on taxes provides for deferment of real property and income taxes during the period of military service, but personal property taxes are entirely disregarded. Either more adequate compensation should be paid by the government or further protection ought to be granted. In the interest of justice to the man in the service and of high morale in the ranks, these shortcomings in the present act provide reason enough for the enactment of remedial legislation.

H. M. M.

PLEADING AND PROCEDURE

JOINDER OF NEGLIGENT DEFENDANTS

Plaintiff alleged in his petition that he sustained damage as a result of injuries to his wife which she was alleged to have received through the combined negligence of the defendants. The negligence charged against the father, Harry Seff, was that he permitted his minor son to operate his automobile contrary to a city ordinance of Akron. The negligence charged against Robert Seff, a minor, was that he violated a city ordinance in the manner in which he made a left hand turn and also that he failed to keep a look out and to control the speed of the car. Each of the defendants demurred to the petition on the grounds of misjoinder of parties. *Held*: That the two defendants were properly joined in the same action.¹

As a general rule, a party suing in tort has the right to join or not to join the different joint tort-feasors as parties to his action for damages.² The reason for this is that a liability in tort is joint and several.³

⁴⁵ Under a similar provision in the Act of 1918 it has been held that foreclosure by entry and possession and statutory foreclosure by advertisement and sale were not prevented by the federal law. *Bell v. Buffington*, 244 Mass. 294, 137 N.E. 287 (1923); *Taylor v. McGregor State Bank*, 144 Minn. 249, 174 N.W. 893 (1919), *dictum*.

¹ *Wery v. Seff*, 136 Ohio St. 307, 25 N.E. (2d) 692 (1940).

² *Brownfield v. Clapham*, 25 Ohio C.C. (N.S.) 443, 27 Ohio C.D. 424 (1916).

³ *Lindemann v. Eyrich*, 21 Ohio App. 314, 153 N.E. 221 (1926).